

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of GERARD J. BIANCO and U.S. POSTAL SERVICE,
POST OFFICE, Devon, Pa.

*Docket No. 97-1104; Submitted on the Record;
Issued June 24, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant sustained any permanent impairment of the upper extremities which would entitle him to receive a schedule award.

The Board has duly reviewed the case record in the present appeal and finds that appellant has failed to establish that he sustained any employment-related permanent impairment of the upper extremities.

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,² including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.³

Section 8107 of the Act provides that if there is permanent disability involving the loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of specifies members, functions, or organs of the body.⁴ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office of Workers' Compensation Programs had adopted the American Medical Association,

¹ 5 U.S.C. §§ 8101-8193.

² *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathanial Milton*, 37 ECAB 712, 722 (1986).

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ 5 U.S.C. § 8107(a).

Guides to the Evaluation of Permanent Impairment (hereinafter the A.M.A., *Guides*) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁵

On October 29, 1992 appellant, then a 37-year-old mailhandler, filed an occupational disease claim alleging that he sustained bilateral carpal tunnel syndrome which he attributed to repetitive motion tasks required in his job. By decision dated December 8, 1992, the Office accepted appellant's claim for bilateral carpal tunnel syndrome and authorized surgery. On December 15, 1994 appellant filed a claim for a schedule award. By decision dated July 18, 1995, the Office denied appellant's claim for a schedule award on the grounds that the evidence of record failed to establish that he had any permanent impairment of either upper extremity due to residuals of his October 1, 1989 employment injury. On March 19, 1996 a hearing was held before an Office hearing representative at which time appellant testified. By decision dated November 4, 1996, the Office hearing representative affirmed the Office's July 18, 1995 decision.

In a report dated September 28, 1994, Dr. David Weiss, a physician selected by appellant's attorney to evaluate appellant, indicated that appellant still had residuals of his employment injury including intermittent numbness in both hands, occasional "pins and needles" sensation and weakness. He also noted that appellant had undergone occasional restrictions in his daily activities. Dr. Weiss stated his opinion that appellant had a 20 percent permanent impairment of each upper extremity due to grip strength loss based on the A.M.A., *Guides*. However, he did not explain, with reference to specific sections of the A.M.A., *Guides*, how he arrived at his opinion of impairment. Therefore, this report does not establish that appellant had any permanent impairment which would entitle him to a schedule award.

In a report dated February 10, 1995, Dr. John C. Dethoff, appellant's attending Board-certified orthopedic surgeon, related that appellant underwent surgery on his hands for bilateral carpal tunnel syndrome in January 1993 and was released for full duty as of February 12, 1993. He stated that when he saw appellant on April 13, 1993, he still had some discomfort in the heel of his hands but that he felt that this problem might resolve in a few months. Dr. Dethoff related that he did not see appellant again and he saw no reason why he could not be working full duty.

In a report dated March 15, 1995, Dr. Dethoff related that he saw appellant in April 1993 and then did not see him again until February 24, 1995. He related appellant's statement that he had improved since his surgery but that he had some transient tingling in his hands and some discomfort with hard usage. Dr. Dethoff stated that appellant underwent additional testing which showed a significant improvement over his preoperative studies and findings within the range of what would be expected after a successful carpal tunnel release. He related that there were notes made by the individuals performing the tests that there was a lack of consistency in the output on appellant's part and that, specifically, when the hand evaluation was done, he was found to have a much greater and apparently normal grip strength when doing the rapid change part of the grip test as compared to when he was asked to simply grip and hold one time as hard as he could and

⁵ James Kennedy, Jr., 40 ECAB 620, 626 (1989); Charles Dionne, 38 ECAB 306, 308 (1986).

that there were also higher coefficients of variation in other parts of the test than one would expect to see. Dr. Dethoff stated:

“My conclusion from the functional capacity evaluation seriously questions whether [appellant] was putting out full maximum capacity during the evaluation. The test results suggest that he was knowingly holding back during certain parts of the test. In conclusion, I do not see any objective evidence to support a decreased functional capacity in his hands ... the question arises as to how much validity one puts on the fact that he still claims significant symptomatology with activities.... I find it curious that he never made his way back [to me] the treating physician to state these problems, which again casts some doubt on the validity or magnitude of those complaints.

“In short, I do not have any objective or clear reason to believe that he has a functional impairment of his hand[s].”

This report, by appellant’s attending physician who performed the surgery on his hands and who found no evidence of impairment, does not support appellant’s claim for a permanent impairment of his hands which would entitle him to a schedule award.

In a report dated February 7, 1996, Dr. Richard P. Whittaker, a Board-certified orthopedic surgeon, selected by appellant’s attorney to evaluate appellant, stated that his examination showed good strength and grip, good abduction of his fingers, nonspecific tenderness in his right elbow and full range of motion. He stated his impression of residual intermittent variant carpal tunnel (syndrome) with possible peripheral neuropathy intermittently of all five fingers and also a diagnosis of intermittent epicondylitis. Dr. Whittaker related that he had advised appellant to return to his attending physician who had performed his surgery and he would be better situated to perform an evaluation of permanent impairment. He stated that it was difficult to determine a percentage of impairment based on the A.M.A., *Guides* since the findings in appellant’s case were primarily subjective but that he would estimate the impairment to be 10 percent. Dr. Whittaker stated that in his experience the symptoms that appellant had experienced gradually resolved and he would be hesitant to label the impairment as permanent. Although he stated his impression of an impairment of 10 percent based on subjective symptoms, Dr. Whittaker did not explain how he arrived at this opinion by reference to specific sections of the A.M.A., *Guides* and he also stated that appellant’s attending physician was in a better position to evaluate his permanent impairment. Furthermore, Dr. Whittaker stated that he hesitated to describe the 10 percent impairment as a permanent condition. As noted above, appellant’s attending physician, Dr. Dethoff, to whom Dr. Whittaker deferred, did not find any permanent impairment. Therefore, this report of Dr. Whittaker’s does not support appellant’s claim for a schedule award.

The November 4, 1996 decision of the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, D.C.
June 24, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member